

EXHIBIT A

1 ANNETTE L. HURST (State Bar No. 148738)
2 DANIEL N. KASSABIAN (State Bar No. 215249)
3 ELENA M. DIMUZIO (State Bar No. 239953)
4 HELLER EHRLMAN LLP
5 333 Bush Street
6 San Francisco, California 94104-2878
7 Telephone: +1.415.772.6000
8 Facsimile: +1.415.772.6268
9 E-mail: Annette.Hurst@HellerEhrman.com
10 Daniel.Kassabian@HellerEhrman.com
11 Elena.DiMuzio@HellerEhrman.com

12 Attorneys for Plaintiffs
13 CANTER & ASSOCIATES, LLC and
14 LAUREATE EDUCATION, INC.

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 CANTER & ASSOCIATES, LLC and
19 LAUREATE EDUCATION, INC.,

20 Case No. C 07-3225 RS

21 Plaintiffs,

22 v.
23 Judge: The Honorable Richard Seeborg
24 TEACHSCAPE, INC.,
25 Ctrm.: 4 (5th floor)
26 Defendant.
27 Date: September 26, 2007
28 Time: 9:30 a.m.

29 Transcript of Audio Recording of Oral Argument

30 Teachscape's Motion to Dismiss, September 26, 2007

1 **Court Clerk:** Calling Case No. C 07-03225 RS Canter & Associates, et al. v. Teachscape,
2 Inc. Will the Plaintiffs come forward please and state your cases?

3 **Daniel Kassabian:** Good morning, Your Honor. Appearing on behalf of Plaintiffs Canter
4 & Associates, Daniel Kassabian. With me are Annette Hurst and Elena DiMuzio.

5 **The Court:** Good Morning.

6 **Gale Athanacio:** Good morning, Your Honor, Gale Athanacio on behalf of Defendant
7 Teachscape.

8 **The Court:** Good morning. Let me give you my tentative thoughts and we will go from
9 there. Let me address the federal claims first, the claim for copyright infringement and then
10 also for Lanham Act advertising issues and I think that's claims for only six and seven.
11 And I address those first for the obvious reason that that's the linchpin for federal
12 jurisdiction in the case. We do operate, and I think everyone agrees, under the notice
13 pleading statement that we find in Rule 8 and not the more detailed fact pleading that is
14 prevalent in state court. That said, on the copyright claim – I have some concerns about the
15 copyright claim. I do think that even with the understanding that we have notice pleading
16 we do need to – or the parties need to at least provide notice of what particular materials are
17 allegedly protected under copyright and then what specific materials allegedly infringe
18 those copyright rights. And you know general references, which is what I find in the
19 complaint to audiovisual online course materials and then some allegations that former
20 employees now have shifted their allegiance. I'm concerned that that's not sufficient. I am
21 familiar within the briefing the arguments that somehow there has been a failure to provide
22 materials for purposes of doing some comparisons. I will likely hear why final course
23 materials aren't sufficient, which I understand are available; why the comparison to
24 determine whether or not there is copyright infringement can't be based upon a comparison
25 with those materials. The long and short of it is, and I'll tell you what my tentative thoughts
26 are on that particular claim, I'm actually inclined to do something like dismissing those
27 claims without prejudice and perhaps having some sort of accelerated discovery period for
28 purposes of having some comparison – giving the Plaintiff the opportunity to take a look at

1 the materials that they're looking for and then make the decision on whether or not they
2 have a basis to re-plead that claim. But the claim as it stands, as I said, I have some
3 problems with. The Lanham Act claim I'm, I have a different view to some extent. I know
4 that the moving party says "claim updated" is just a term, puffery and it's not enough to say
5 that there is some misleading going on for purposes of the advertising claim and this is, as I
6 understand it, in connection with the Marygrove course offerings. I tend to think that the
7 arguments that go to whether or not it's sufficient, that, in and of itself is sufficient to make
8 out such a claim is an issue for later in the case. I think for purposes of pleading, I think
9 that, I'm inclined to think that they have plead out in the Lanham Act claim. With respect
10 to the other claims, the state claims for trade secrets and interference; and we got two
11 interference claims, an unfair competition claim, a state claim with respect to the
12 advertising. I think for purposes of ruling pleading that those are sufficiently pled and I
13 think most of the arguments that I see are arguments that go to issues down the line that will
14 be battled about either on summary judgment or, with respect of the trade secret claim,
15 some further fleshing out of those under 2019, but I don't see it as a basis for dismissal. So
16 that's where I am. I don't know who wants to jump up and address it first. Probably the
17 moving party.

18 **Ms. Athanacio:** Gale Athanacio again on behalf of Defendant Teachscape. With regard to
19 Your Honor's observation on the copyright claim, we believe that Your Honor is absolutely
20 correct. We understand that the pleading requirement of the Rule 8 is notice pleading. We
21 certainly have not been given notice in this instance. But Your Honor, with regard to
22 whether or not they have stated a claim and whether or not it would be appropriate to allow
23 them to maintain this action and conduct discovery, we believe that that is not appropriate in
24 this instance. We believe that the *Bell Atlantic* case is on all fours because in this instance
25 Your Honor, the representation made in the complaint was that we flatly refused to provide
26 the final course materials, we placed unreasonable restrictions. By virtue of the fact of them
27 injecting that into this matter, we were appropriately able to show the correspondence that
28 transpired between the parties and literally all we asked for was the information that was

1 contained in the copyright registrations and nothing more and we would exchange the actual
2 course materials.

3 **The Court:** Why can't we do that now?

4 **Ms. Athanacio:** Your Honor, I'm not saying that you can't but we were told that that was
5 unreasonable. We have now been forced to file a motion to dismiss.

6 **The Court:** If I say now that it is reasonable and I dismiss the claim, and say what you say
7 you were prepared to do before is what ought to be done. Isn't your argument at that point
8 simply, well, "Why didn't you do it earlier?" I mean, I'm not sure what the argument is.
9 Your argument to me now is that I should dismiss this with prejudice. This is the first that
10 I've seen of this claim and you're saying right out of the box you're saying it should be
11 dismissed with prejudice and even though we were prepared at one point to share some
12 materials because of the back and forth, now we don't even think that should happen. You
13 should just throw this claim out. Isn't that inconsistent with the notion that a party has an
14 opportunity, in the general course, if they can re-plead, they're given the opportunity to re-
15 plead at the very least once and sometimes they'll ask more than once but you know, isn't it
16 a bit draconian at this stage, "Oh, you're out. We won't even entertain re-pleading."

17 **Ms. Athanacio:** No, Your Honor, I don't think it is because they had an affirmative
18 obligation prior to filing a lawsuit and inflicting this burden upon the defendant to conduct a
19 reasonable investigation into the claim. And the question is as the matter stands now,
20 "Have they stated the claim?" And they have not and they have conceded that they have
21 not stated a claim because they have not been able to identify a single, substantial similarity
22 and the infringing work whatsoever. The fact of the matter is they have filed a piece of
23 litigation deliberately to impose burdens on us above and beyond what we were prepared to
24 do to forestall any litigation. In this instance, they now have from what we can tell, and we
25 don't even know Your Honor, that's part of the problem, they have registered after we
26 raised the issue with them, three years after the employee supposedly was up. That's when
27 they registered the copyright infringement claims. Now, apparently, they have identified
28 everything in their course materials. Now, they are suggesting that we are obligated to

1 produce all of our course material whether or not (and it's unclear again) whether or not it
 2 pertains to Marygrove or not and all drafts. And that is an incredibly burdensome task. As
 3 I understand it, based on representations made by Plaintiff's counsel when we were going
 4 through this needless negotiations, just the actual course material, some subset of it was
 5 more than twenty boxes. And Your Honor to suggest that they have the ability to, you
 6 know, shoot first and then ask questions later, is not the purpose of federal litigation. This
 7 is exactly what *Twombly* has indicated a litigator should not be able to do. I'm not saying
 8 that the parties may not engage in some sort of discussions to try to resolve these particular
 9 issues, but that is not the appropriate — the Court is not the appropriate vehicle. Litigation,
 10 prior to knowing whether or not you have a claim flatly rejecting a patently

11 **The Court:** What you are essentially saying, almost, and you denote, you are almost
 12 saying that it is a sanction for what you deem to be improper pre-litigation discussion. That
 13 the claim should be tossed. What I'm looking out is, I'm trying to get a handle on the
 14 merits to the claim. Is there a claim for copyright or not? I agree with you that I think, as
 15 pled at the moment, it is not sufficient, but you're saying that in addition to that because of
 16 this pre-filing activity they should be precluded from an opportunity to determine whether
 17 or not there is a claim there that they can make out or not. And that's a fairly harsh remedy
 18 and I understand you know *Bell Atlantic*. I know what your argument is there, but again it
 19 seems a bit harsh to say that well, "You can't even attempt to re-plead it." I mean I assume
 20 that if I was to say well, "I'm not going to allow discovery to occur now but I am going to
 21 let you have a chance to see if you can re-plead it with a bit more specificity. I wouldn't see
 22 where you would have any objection to that. I mean there is not basis at this stage as far as
 23 I can see to say, "It should be a dismissal with prejudice." Other than this argument that
 24 somehow, again almost on a Rule 11 basis, where you haven't done a sufficient pre-filing
 25 investigation but some of the materials they would want are in your hands.

26 **Ms. Athanacio:** Right, but also some of the materials are in their hands, which they have
 27 refused to produce to us.

28

1 **The Court:** That's why I've given you the right to re-plead. I'm mean that we do all of the
2 time. Whey shouldn't they have the right to re-plead?

3 **Ms. Athanacio:** Your Honor, I'm not suggesting that they should not have the right to re-
4 plead necessarily.

5 **The Court:** Okay.

6 **Ms. Athanacio:** But what I am concerned about is the notion that they made very clear
7 both in their papers and their prior dealings with us that they are looking to engage in
8 extensive, very burdensome, very time-consuming, very distracting discovery. We make an
9 offer and I don't know, I would recommend to my client that we engage in a type of apples-
10 to-apples comparison with the case dismissed without prejudice giving them a time to re-
11 plead. But what I do object to is them being burdened with all of the other issues in so far
12 as....

13 **The Court:** Well, we can talk about the scope of discovery that I would allow which is, I
14 understand your point. And that's sort of a timing question. What they could explore
15 initially to make the determination of whether or not they have a copyright claim to go
16 forward, but now going to their other claims to the extent that I deny your motion with
17 respect to some of these other claims, some of this discovery may be relevant to those so
18 you probably ought to – I encourage you to now move from copyright and talk about the
19 other claims.

20 **Ms. Athanacio:** Yes, Your Honor, and what I would focus in on is in particular the
21 Lanham Act thing because that is the only other predicate to this Court's jurisdiction and if
22 neither of those claims stand, there is no basis in which to burden this Court with this
23 particular litigation because truly it is, these claims, as I understand them are state law-
24 based claims. With regard to the Lanham Act, Your Honor has indicated that, at least your
25 initial feeling is that for notice pleading purposes that a mere reference to "updated" is
26 sufficient. The problem that I have with the ability for them to proceed is that they haven't
27 identified specifically the advertisement that they're referring to. They haven't presented to
28 this Court the full context. What they have done is, in their complaint, they've done

1 nothing more than say that the Marygrove – and they've articulated it in three or four or five
 2 different ways depending on where it is in their complaint, that they have identified the
 3 Marygrove degree program has been updated. It is indisputable and I don't believe
 4 plaintiff's counsel would suggest that the degree is issued by Canter or the degree is issued
 5 by Morret or the degree is issued by Teachscape. It is Marygrove's degree program.

6 **The Court:** Yes, but unlike their copyright claim you know what they're contending.
 7 Their contending they've told you at least with respect, they may argue that it's more
 8 extensive than this, but at the very least they've said, "The use of the term 'updating' is
 9 what we say, with respect to the Marygrove program, is what results in being deceptive and
 10 false advertising." You may have a bazillion arguments as to why that's not going to
 11 prevail and you may also say, "Well, they haven't fleshed it out by telling us which specific
 12 course materials that Marygrove put out that has this reference or whatever." But those are
 13 summary judgment type of issues. Those are not issues, unlike the copyright claim, you
 14 know what they're contending. You may not think much of it, but you know what they're
 15 contending and to argue that they have to set forth each advertisement and the date of each
 16 advertisement. I think it's a different situation than with respect to the copyright claim. I
 17 think you're on notice. You may not think much of the claim and you may well be able to
 18 dispatch it, but you're on notice as to what it is.

19 **Ms. Athanacio:** Actually, Your Honor, we're not because the only advertisements that are
 20 referenced or made reference to are apparently Marygrove advertisement on its website and
 21 published materials.

22 **The Court:** Yes.

23 **Ms. Athanacio:** I don't know. My client doesn't know exactly what they're referring to
 24 that we in particular did that's distinct from Marygrove. I don't know why they're trying to
 25 suggest that we're vicariously liable? That's certainly not pled in this case.

26 **The Court:** Right.

27 **Ms. Athanacio:** And then in so far as, Your Honor, we cited to cases and they don't
 28 dispute that assessment of a Lanham Act claim is appropriate to resolve on the motion to

1 dismiss on the pleadings. You can make that determination as a matter of law. One of the
2 fundamental predicates is you look at in context. And in the complaint it just says updated.
3 Then in their moving paper, excuse me, their opposing papers they reference a Marygrove
4 degree that says it is updated in parens. Your Honor, you are not in a position nor are we
5 are not in a position to bring that matter to the court's attention. I am not aware of any case
6 where there is a suggestion that where there is a claim that there has been an advertisement
7 where there has been a false statement of fact. But they don't have to say what the
8 advertisement is. In all the cases that we cite you talk about you assess that in the context of
9 the full advertisement. In general and in theory Your Honor can conceive of ways why an
10 update may or may not be recovery. We're not given the opportunity because we don't
11 know what exactly what it is they are referring to nor does Your Honor to say "ok now you
12 understand, Your Honor." Now you can look at it and say "of course this is puffery."

13 **The Court:** Okay. Before we talk about state claims if we get there let me ask you Mr.
14 Kasbian. Kasabian. I am pronouncing that right?

15 **Mr. Kassabian:** Kassabian.

16 **The Court:** Kassabian, thank you.

17 **Mr. Kassabian:** Let me try to address the concerns you raised at the beginning and try to
18 hit in response to defendant's counsel on the way here. With respect to the copyright claim.
19 First off it is our position that it is sufficiently pled on the facts alleged. One fact that was
20 not emphasized in the briefs and I think we'll turn back to it again in the Lanham Act claim
21 is the fact that Teachscape and this is in the pleadings, Teachscape advertised at least one of
22 its programs as updated and given the accompanying allegation that there was no prior
23 program at all at Teachscape, that that update is a reference, is a comparison to Canter's
24 preexisting program.

25 **The Court:** So that's your Lanham Act rather than the copyright argument?

26 **Mr. Kassabian:** That is primarily Lanham Act. It is the primary theory under which our
27 Lanham Act claim lies but also speaks to the factual underpinnings of the copyright claim.

28

1 Now as Your Honor is aware, we weren't given access to the course material. Now I'll talk
 2 a little about the ...

3 **The Court:** Some of it is in the public domain, isn't it? Some of this course material?

4 **Mr. Kassabian: No.** That is exactly the problem, Your Honor. In terms of the final
 5 materials, which I'll elaborate as being course materials that are being used right now by
 6 teachers who are engaged in these programs. Those are only available to those persons
 7 once they are registered for the program.

8 **The Court:** Okay.

9 **Mr. Kassabian:** So we have to engage in some sort of pretext.

10 **The Court:** Okay. Let me put aside the back and forth on whether or not you got access or
 11 not. As the copyright claim 6 at the moment. At the very minimum even with notice
 12 pleading you would expect and require that somebody identify what are the materials that
 13 are infringing? I mean to simply say everything must infringe. We have these copyright
 14 rights over a host of unspecified course materials and they are in the same business so they
 15 must infringe. That's not enough.

16 **Mr. Kassabian:** Your Honor, let me suggest that first off we're not talking about
 17 everything Teachscape does. This is a particular marketplace. We've specified these
 18 materials as relating to distance learning masters degree and graduate courses in the field of
 19 education.

20 **The Court:** I don't know as it sits now. Is it five, ten, twenty-five million? I don't know
 21 what. That's a nice, generic, very generic description of a type of course material. I have
 22 not any idea nor would I expect them to know what particular things they have that you say
 23 infringe. Now if your argument is "well we don't know," then I mean, why you don't know
 24 and I understand and I've looked at the case law that talks about you being in that situation.
 25 The bottom line is it doesn't provide. For whatever reason it doesn't provide adequate
 26 notice. I don't have a clue what this claim is really going at. The copyright claim.

27 **Mr. Kassabian:** Well, Your Honor, I turn to the point you were making that to the extent
 28 we don't know because we don't have access and what here defense counsel is trying to do

1 is precluding inquiry into that area by saying you failed to state a claim and so circularly we
 2 don't have to provide you with that information so you can never state a claim.

3 **The Court:** Well, they – the argument is, as I understand it, more what you think you
 4 needed to take a look at to make the inquiry to do this analysis, and they're indicating to me
 5 that the final course materials at one point in time they were prepared to provide to you.

6 Why do you need – for purposes of the copyright claim – why do you need drafts and the
 7 like? The copyright analysis is, there's materials out there, course materials in this instance,
 8 and those are either similar or they're identical and they infringe our copyright rights.

9 Whatever, however they developed it is more a trade secret issue, whether or not they took
 10 your trade secrets to develop it in terms of drafts.

11 **Mr. Kassabian:** Um . . .

12 **The Court:** Why do you need the drafts for purposes of copyright infringement analysis?

13 **Mr. Kassabian:** Your honor, I'm glad you raised that question. The drafts are
 14 fundamental because the drafts themselves – we can call them drafts but ultimately they are
 15 themselves copies that subject each state to copyright liability. And so, separate and apart
 16 from what the final course materials are, those drafts, and the fact that they, those drafts
 17 might in fact be copies of our materials as a starting point, there's infringement there. And
 18 then it's a question of . . .

19 **The Court:** Wait a minute. If I go and there's a copyrighted material and I make a copy of
 20 it and I make a bunch of notes and I never, it never sees the light of day and it stays in my
 21 office, am I infringing your copyright rights?

22 **Mr. Kassabian:** Under the *Walker* case and its progeny, it's clear that any unauthorized
 23 use, or copying I should say, and that is, it's not a matter of holding it in your hand, having
 24 an unauthorized copy and holding it in your hand and taking notes that's wrong, it's the
 25 copying of it in an unauthorized fashion – that is infringement. And in those progeny,
 26 typically the defense raised is fair use. Here there is no fair use defense available to them.
 27 And so, folks seen back in on the drafts – we can call them drafts, but ultimately they're
 28 also copies, and that's the allegation on which – we need to cement that that can be

1 copyright infringement and therefore there's liability. And their refusal to discuss drafts,
 2 exchange drafts or whatnot is a further indication to us that there's a likelihood of
 3 infringement, and hence that in the pleading.

4 **The Court:** For purposes of whether or not there is a real, actionable copyright
 5 infringement claim here, putting aside the theoretical concept of whether or not if they make
 6 a – if this draft consists of a copy that's maintained in their office or whatever – for
 7 purposes of your claim, what you need to know is whether or not they're out in the
 8 marketplace with course materials that infringe your copyright. I mean, otherwise it's all
 9 rather theoretical and it's not going to be the basis of a cognizable copyright claim. So the
 10 idea that you're going to get to plumb the depths of these drafts and all the rest – at least for
 11 the purposes of whether or not you're going to be able to craft a claim – I'm not very
 12 convinced. I think that these drafts, to some extent, if the case goes forward here, it's
 13 somewhat an academic argument, because I think you probably will get the drafts for
 14 purposes of analyzing your trade secret claim and the like. So, it's a question of when not
 15 whether. But I just don't see you needing to get to the extent of the materials that you say
 16 that you need for purposes of determining whether or not you've got a viable copyright
 17 claim.

18 **Mr. Kassabian:** Well, Your Honor, I'll turn to the development process, and basically you
 19 can have a set of drafts here based on our materials from which have spawned course
 20 materials and may spawn future course materials, and we are entitled to injunctive relief to
 21 get that out of their hands and have them stop using those drafts. And to the extent that
 22 they've used them in the past, that's a question of whether there's a sufficient tie between
 23 that use and their final course materials such that damages ensue. But I do think that the
 24 drafts themselves do subject the defendant to copyright liability if they are copies. And we
 25 can't, under the *Walker* cases you can't just sort of scrub the process along the way and say,
 26 "oh well, you can forget about drafts because the final course materials don't meet the
 27 substantial similarity test or whatever the copyright infringement test is." The draft
 28 themselves is an unauthorized use, from there, the question becomes what do you do with

1 that? Does it lead to damages? Is there injunctive relief available at this point? And that's
 2 a separate question as to whether there's liability.

3 **The Court:** Okay, why don't you address in more detail the Lanham Act claim.

4 **Mr. Kassabian:** With respect to the Lanham Act claim, Your Honor, I think Your Honor
 5 already alluded to Your Honor's thoughts that there had been sufficient facts pled, and I did
 6 already note. But in our complaint, and in particular I just point out to one allegation,
 7 paragraph 19. We have alleged that it was Teachscape's advertisement that was untrue or
 8 misleading, or and misleading, and likely to deceive the public. And so, under the current,
 9 the present standard for the motion to dismiss, that has to be taken as true, and, again,
 10 defendant is trying to argue that it's untrue by saying this was Marygrove's advertisement,
 11 and it's not. It's Teachscape's advertisement that is referenced in the pleading. And, Your
 12 Honor, we have provided sufficient context, facts and description of the course for which
 13 we had a preexisting course by the exact same name at the time that this advertisement
 14 came up with the reference to updated. And as I already explained to Your Honor, the term
 15 "updated," though it's one short word, isn't puffery. It means something. By the very
 16 dictionary definition it means that there's a preexisting – something's out there – there's
 17 been additions, changes to bring it up to date. And so, in that is a comparison, and then we
 18 have to go through the process of seeing if it's a true comparison which, if it is a true
 19 comparison, that actually substantiates the copyright claim. If they say, well, actually we
 20 did take your materials and update them, then you have a greater likelihood of copyright.
 21 But putting that aside, if it's not true, whether it's false, whether it's false by implication,
 22 and then whether there's confusion, as Your Honor stated earlier. Those are fact questions
 23 that at best could be subject to a summary judgment motion. The claim has been pled with
 24 enough facts that it gives defendant notice. I'm also a little shocked that what they're
 25 coming with is, we don't know what they're talking about. It's their advertisement.

26 And . . .

27

28

1 **The Court:** Well, you now identify the particular paragraph where you say you have
 2 identified an advertisement. But they were suggesting that it appeared that your focus was
 3 on Marygrove's advertising as opposed to your own advertising.

4 **Mr. Kassabian:** No, the clarification there, Your Honor, is that, again as part of the
 5 context, the degree program that the advertisers updated was through Marygrove College.
 6 We are in agreement that it's the colleges and universities that ultimately offer the degree
 7 once the program is completed.

8 **The Court:** Right.

9 **Mr. Kassabian:** It's plaintiffs and defendant that create the program, including the
 10 underlying course materials, and so, in this case, it's also the plaintiff and defendant that
 11 provide the advertising materials. As far as we can tell, the defendant does that, has
 12 provided one in this context, has indicated that one of its course offerings through
 13 Marygrove has the exact same title as Cantor's while Cantor's was existing, and then
 14 referred to it as updated. And so that, I think that gives them sufficient notice to go back to
 15 their client and say, is this true? Did we put out an advertisement about our programs
 16 through Marygrove that are updated, and then go from there. And then, obviously as, Your
 17 Honor has indicated, there is discovery from which there is contention interrogatories,
 18 document requests, all those things can – these factual details can be ferreted out.

19 **The Court:** Okay. With respect to the state claims, I think that the – I think it's apparent to
 20 you that at the very least, and I'm going to consider this further, but at the very least I'm
 21 going to dismiss the copyright claim such that I would anticipate either – you're going to be
 22 put to the decision of whether or not to replead it, and you've given the argument's both
 23 sides with respect to the state claims. I don't propose to have discussion about that. I am
 24 going to focus first on the question of the adequacy of the federal claims, and then I have
 25 your arguments with respect to state claims and I can simply rule on the motion to dismiss
 26 after we get through the process of whether or not the federal claims are in a proper state
 27 that it can go forward. So, in other words, there's going to be another day where that will
 28 come up, and I'm not proposing that we need to spend time on that today. Let me ask –

1 let's assume for a moment that I do dismiss without prejudice the copyright claim and I will
 2 allow some limited discovery during a period of time before the point at which re-pleading
 3 would be required to determine whether or not there is a copyright claim to be presented
 4 here. Talk to me a moment about that scope issue that you had brought up before that you
 5 think what plaintiff wants is far too broad.

6 **Ms. Athanacio:** Your Honor, I believe it's far too broad because frankly we don't have a
 7 firm understanding as to exactly what it is. If they are interested in the final course
 8 materials that they claim are infringing that is we're doing the same courses that they were
 9 doing to Marygrove. If they can identify that course and what their course material is for
 10 attorneys-eyes only and we would do the same for attorneys-eyes only so we could then
 11 literally line them up and sit down. It's my belief and I think the correspondence suggests
 12 that the suspicion. And it is a suspicion. And in our minds nothing more than that
 13 obviously they disagree that we basically took their course material, changed the name and
 14 put it out with Marygrove. That is the driver of this entire case. It really is. And if we
 15 could agree to identify exactly what the course materials are. What are the courses or the
 16 degrees that they take issue with and engage in exchange of those and stay the action as to
 17 everything else and then have the parties either among themselves or before the Court once
 18 there is an assessment to whether there is any there there. That would be the appropriate
 19 thing to do.

20 **The Court:** Now they are contending that they don't as I understand it they don't know
 21 exactly what your course offerings are so asking them to identify to you which courses they
 22 are focused upon. They need to know what your courses are.

23 **Ms. Athanacio:** I apologize Your Honor. I was not clear. I believe that those particular
 24 degree programs which within that have certain course materials.

25 **The Court:** Okay.

26 **Ms. Athanacio:** They can say this is the degree program that we have that we think you've
 27 taken our course material and copied or have created something that is substantially similar

28

1 based on essentially copied then we sit down and try to have a reasonable discussion about
 2 whether or not their fears have any validity.

3 **The Court:** Right. Mr. Kassabian.

4 **Mr. Kassabian:** Your Honor, this suggestion I think doesn't get us where we need to be
 5 and part of what was just alluded to was the fact that we need to identify our materials that
 6 we believe they infringed with more particularity before they show us anything. And I
 7 think there's a couple of problems. First off, with respect to the final course materials, that
 8 term in and of itself is somewhat ambiguous because we do have materials that we could
 9 consider final and they are in teachers hands now. But beyond that, again in context of the
 10 advertisement and the particular course that they termed "updated" those final course
 11 materials as we understand it presently those aren't in teachers' hands. And there's an
 12 entire program there that it's the masters in the art of teaching with a focus on curriculum,
 13 instruction and assessment. That's pretty clear on its face what it is and it's in the pleading
 14 for which they could articulate once we get into this process that Your Honor's directing us
 15 to that those aren't final course materials. These are all — there's a core program here Your
 16 Honor of masters in this field of education around which there's areas of focus and those are
 17 slight changes of courses and materials. We're not talking about five different degrees each
 18 with ten different courses. At least that's our understanding. Again that's our
 19 understanding as to how our own materials work and based on our understanding of how
 20 their materials work on what limited information we have.

21 **The Court:** The problem is the more you articulate for me how much in the dark you are.
 22 And you say it is because of their hiding the ball. But how much in the dark you are it
 23 really emphasizes that you don't have a clue whether or not they are violating your
 24 copyrights. That's the problem. I mean you are saying this is no different than in any other
 25 business where perhaps there's a certain level of distress with your client that employees
 26 have left and gone elsewhere. Not an unusual circumstance. And you are saying they're in
 27 the same business we are. They have their own employees. They must be violating our
 28 intellectual property rights. They must be. Well, I hear nothing more than "must be." And

1 the idea that well, we should be allowed to rummage around in all that they do in order to
 2 figure out whether or not they violate our copyrights is you're going on a wing and a prayer
 3 here. And that's where the more you tell me that you're in the dark, the less I'm convinced
 4 you have a copyright claim. Or whether or not you know you have a copyright claim. That
 5 concerns me.

6 **Mr. Kassabian:** Well, Your Honor.

7 **The Court:** And that concerns me to then say before you have a stronger understanding of
 8 whether or not your copyrights are violated, to then say you're going to get to discovery
 9 before you've formulated a viable claim, does run right into *Bell Atlantic*. And, I mean,
 10 that's a problem.

11 **Mr. Kassabian:** Well, Your Honor, I do want to address quickly that, first off, we don't
 12 believe a stay of the rest of the claims which Your Honor has indicated have been
 13 appropriately pled, those should be stayed while we proceed with the copyright.

14 **The Court:** Well, I have to determine whether or not you're properly in this Court. And
 15 that's why it's a little different than – if you were in a circumstance where one claim is
 16 tenuous and needs to, the party needs to take a look to see whether or not they can replead,
 17 but I know they can go forward with the other claims, that would be a different ball game.
 18 But here, and again, what complicates it is, as I've indicated, I'm more inclined to think the
 19 Lanham Act claim can go forward, and if that can go forward, then you're going to be here,
 20 and in that circumstance, maybe things shift. But let's put that aside for a moment. I have
 21 to make the initial determination of whether or not you're properly in federal court. And
 22 that's why there's a basis for saying, we've got to get that determination made first. So it's
 23 different than the ordinary case where we all know in this place you're going to go forward
 24 with x number of claims. So, we don't have to stay anything, just go to it. It may be you're
 25 in state court doing battle on some of these claims. So that's why I think it is – the Lanham
 26 Act claim being a bit of a complication in that, but

27 **Mr. Kassabian:** Well, Your Honor, I guess I jumped to the conclusion that we were on sort
 28 of one side with respect to Lanham Act versus the copyright . . . and I understand that

1 **The Court:** No, I'm still _____.

2 **Mr. Kassabian:** . . . but getting back to the main issue of here of how we move forward
 3 with the copyright claim and our opportunity to articulate it through getting some initial
 4 discovery, I tried to articulate specific programs by name, and those are referenced in the
 5 complaint, and we're talking about final materials in the hands of teachers, that's one thing.
 6 But I don't want to have that lost in the shuffle of other programs that, again in particular
 7 this curriculum instruction and assessment focus where just because they're not in the hands
 8 of teachers now they're not considered final. And that they're

9 **The Court:** Well, but my view is if you take a look at what's -- however you want to
 10 characterize it, what's deemed as final -- you look at it, and you can't bring a copyright
 11 claim based on that material, whether or not subsequent discovery, more extensive
 12 discovery at some moment in time could give you a basis to bring that claim, that's just too
 13 bad. If you're not -- if the basic materials that are out there are not going to be enough for
 14 you to bring a copyright claim, I'm not much concerned about the fact that if you've got to
 15 rummage around for a long, long time in every piece of paper they have maybe you could
 16 come up with something, I mean, it's going to live or die on those materials. Now, once
 17 you've convinced me that you can bring a copyright claim, then discovery will be, you
 18 know, more extensive and you can go into some of these issues and perhaps, you know, see
 19 whether or not your claim is stronger than you initially thought it was. But you've got to
 20 convince me first you've got a claim there before I let you look at all the discovery that you
 21 would look at in a case that's otherwise already properly before me. I mean, you want to
 22 put the cart before the horse here, and I'm not inclined to let you do that. So, you need to
 23 convince me a bit more that there's a copyright claim here. Because until you do that, it's
 24 not open sesame on the other side's materials.

25 **Mr. Kassabian:** I understand, Your Honor. Again, the one point I would emphasize is,
 26 with the drafts, we do hold firm to the position that the drafts in and of themselves can
 27 constitute infringement, and in moving forward, if Your Honor feels that you should
 28 dismiss the copyright claim now but provide some limited avenue of discovery, we need to

1 be clear on what goes forward. And we're not looking to rummage through every scrap of
 2 paper, but the question becomes what is a final and what is a draft? And I can see them
 3 taking an extremely narrow view in hoping to shield themselves from liability by focusing
 4 on certain things and not on other things which would show infringement.

5 **The Court:** Okay. All right, go ahead.

6 **Ms. Athanacio:** If I may, Your Honor, because I think my impression is, Your Honor,
 7 fairly firm in the belief that as presently pled the copyright infringement claim does not
 8 state a claim and you're inclined to dismiss that. With regard to the Lanham Act, if that is
 9 again the only other potential predicate, counsel for the plaintiffs have now articulated again
 10 a different theory as to what is the advertisement. As I understood it, and please correct me
 11 if I'm wrong, the advertisement now is not something that Teachscape put together or put
 12 on their website, what have you, but rather what they're talking about is, and it's the only
 13 one that's identified in the complaint is that there's a reference to an advertisement on
 14 Marygrove's published materials.

15 **The Court:** Well, but

16 **Ms. Athanacio:** And on Marygrove's website.

17 **The Court:** Yes.

18 **Ms. Athanacio:** Now, I understand, from what he said, they're suggesting that somehow
 19 we had some influence on that or were partners with that.

20 **The Court:** Right.

21 **Ms. Athanacio:** However, number one, that is not in and of itself pled in this, that's not
 22 what the claim is.

23 **The Court:** What they plead, I'm looking at the paragraph that counsel has referred me to .

24 . . .

25 **Ms. Athanacio:** Mm-hmm?

26 **The Court:** "By marketing a degree offered through Marygrove as updated, Teachscape's
 27 advertising was untrue and misleading and likely to deceive the public in that it implied that
 28 Teachscape's courses were updates or improvements of courses previously offered." Okay.

1 You may be able to say that that's totally absurd and you will be able to prevail that there
 2 are no disputed facts that they did not indeed have advertising along the lines of the way it's
 3 pled. But that's the way it's pled. You know. You know what they're alleging, so I don't
 4 understand why you think that that's deficient.

5 **Ms. Athanacio:** Because every single case, there's not a single case that I'm aware of, nor
 6 that I look that they cited to where you can say that somebody did an advertisement but you
 7 can't say what that advertisement is. Just saying we advertise it, we don't know if it's one
 8 or ten. And what they've articulated, in fact, is that it's an advertisement that is

9 **The Court:** But your argument in response to their allegation is you want me to consider, it
 10 sounds like, some factual argument you're making that you didn't have any advertisements.
 11 Well, that's for another day. They have pled, and they have an obligation to do so in good
 12 faith, that you have advertising which is yours that is offered through Marygrove, so it may
 13 say Marygrove on it but it's your advertising, they're alleging that Teachscape put it
 14 together and that then Marygrove has it out there and it's reflected as updated. Now, they
 15 made that allegation. And I can't get behind the allegation and consider your factual
 16 argument. The question is, does that put you on notice of what they're contending? That's
 17 the issue. Not whether or not it's right or wrong or it's going to be proven in the end or not.
 18 But it's unlike a copyright situation in my mind where you don't even know what materials
 19 are that they say. Here, they're saying you've got advertising and that advertising was
 20 untrue and misleading. Okay, well, if you show us in the case that you don't, so be it.

21 **Ms. Athanacio:** But, Your Honor, the fundamental problem is, you can't – and there isn't a
 22 case that supports the proposition. You can't just say you advertised something. You can't
 23

24 **The Court:** You're talking about a specific advertisement that says updated, and your
 25 argument is, that's not their advertisement, that's Marygrove's advertisement. That's a fact
 26 issue.

27 **Ms. Athanacio:** Your Honor, but they had clarified, and they've stated in their own
 28 complaint something that's factually inconsistent, and that's something that the pleading

1 requirement does not allow them to do. They can take legally inconsistent positions, but
 2 they cannot allege

3 **The Court:** What's the inconsistency?

4 **Ms. Athanacio:** The inconsistency is when they talk about in paragraph 56, the updated is
 5 on Marygrove's website. The CNA degree offered by Marygrove was described as updated
 6 in Marygrove's published materials and on its website.

7 **The Court:** Right. You know they're saying that – they've told me a few moments ago –
 8 that they will be on Marygrove website but the advertisement was theirs. You may be able
 9 to show that that's just totally wrong. But you know what they're contending.

10 **Ms. Athanacio:** Well, but, Your Honor, the problem with that – now that they – now that –
 11 if in fact that is what they're saying, first of all, I'm entitled to brief it because I didn't know
 12 that it was part of this, and there are cases that so – you can't just allege that you're
 13 responsible for an advertisement that somebody else did. This is Marygrove's website.
 14 This is Marygrove's published materials. There was case law that says you can't just say
 15 well, you're responsible for it. That's not sufficient to state a claim.

16 **The Court:** On a motion to dismiss.

17 **Ms. Athanacio:** On a motion to dismiss. And I can find it for you. But it wasn't
 18 something that I was aware of that we were required to do. But equally importantly . . .

19 **The Court:** Why? I mean, I see this as – I don't find this to be as confusing as you do.
 20 They're making an allegation. They're saying it's through Marygrove College. Through
 21 Marygrove College. It means that they – as I read it – they claim that the advertisement was
 22 put together and then the conduit for getting the advertisement out there is Marygrove
 23 College. I don't find that particularly confusing. It may be wrong, but I don't find it
 24 confusing.

25 **Ms. Athanacio:** Well, then, that's perfectly fine. But if that's the case, if that is in fact the
 26 case, then I respectfully disagree with the Court's conclusion that you cannot find as a
 27 matter of law that it is not actionable. On a Marygrove website, of its degree program,
 28 again, its degree, that its degree program is updated. That is a completely different issue

1 than the suggestion that Teachscape had said that Cantor's courses or underlying data is, in
2 fact, something different. That's a very different claim. And that, and the case law that we
3 have shown, is very clear on that. That, one, on its face is true because Marygrove did have
4 a degree program. There's no question about it. That was on the exact same subject. To be
5 said that it's new, it's updated, it doesn't suggest substantial similarity. The cases that we
6 cite to, Your Honor, specifically talk about suggesting that something's improved, or new
7 and improved, is not actionable. It is puffery at a minimum as a matter of law.

8 **The Court:** Okay. All right, I've heard what I need to hear and thank you very much. I'll
9 take it back and take a look at it and give you all an order.

10 | Mr. Kassabian: Thank you, Your Honor.

11 | Ms. Athanacio: Thank you, Your Honor.

12 | The Court: Thank you very much.

END OF AUDIO RECORDING